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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 666

HELEN CORINNE SCALES TRICE, Executrix,
Petitioner,

vs.

COMMERCIAL UNION ASSURANCE
COMPANY, LTD., et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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MAY IT PLEASE THE COURT:

This case was first tried before the United States District Court for the Middle District of Tennessee, Columbia Division, in May, 1962. The opinion of the District Court is published at 213 F. Supp. 675. This judgment was appealed and the opinion of the Sixth Circuit Court

of Appeals rendered July 14, 1964 is reported at 334 F. 2d 673, certiorari denied 380 U. S. 915, 13 L. ed. 2d 801, 85 S. Ct. 895. The case was remanded to the District Court and again tried in September, 1966. The District Court opinion on this second trial is unreported, but the opinion of the Sixth Circuit Court of Appeals following the appeal from the second trial in the District Court is reported at 397 F. 2d 889.

STATEMENT OF THE CASE

Respondents accept the statement of the case of the petitioner with the following supplement:

The case was first tried before a jury in May of 1962. In this first trial nine separate insurers were defendants, seven of them by reason of policies issued on buildings and equipment, and two of them by reason of policies issued on grain and related commodities allegedly stored in the mill. The jury returned a verdict on special interrogatories, finding that Scales did not procure the burning of the mill; that Scales was guilty of fraud, false swearing, willful concealment and misrepresentation of material facts concerning the grain allegedly stored in the mill; that because of such fraud, etc., as to the grain policies Scales was liable to the two companies insuring grain and related commodities in the amount of $3,000.00 under Tennessee Code Annotated, Section 56-1106, for bringing suit in bad faith; that Scales was not guilty of fraud, false swearing, misrepresentation of material facts or concealment as to the building and machinery policies; that the seven companies insuring buildings and machinery were liable to the Scales estate for $25,000.00 on the buildings and $20,000.00 on machinery and equipment.

The Scales estate promptly paid the $3,000.00 penalty assessed against it by reason of its fraudulent claim against the grain insurers.

The trial court subsequently sustained the motion of the building and machinery insurers for judgment notwithstanding the verdict on the grounds that Scales was guilty of fraud, false swearing, willful concealment and misrepresentation of material fact as a matter of law. Further, pursuant to motion of the building and machinery insurers, the trial court granted an alternative new trial on the issues of fraud, etc., and arson, holding that the jury verdict against the building and machinery insurers contravened the overwhelming weight of the evidence. The trial court further granted in the alternative a new trial to the building and machinery insurers because of the prejudicial misconduct of counsel for the plaintiff.

213 F. Supp. 675.

The Scales estate then appealed the action of the trial court to the Court of Appeals for the Sixth Circuit.

The Sixth Circuit Court of Appeals reversed the trial court, holding that it was error for the trial judge to enter judgment notwithstanding the verdict on the question of fraud and false swearing because such did not appear as a matter of law but rather constituted a question of fact for determination by the jury. The Court of Appeals affirmed the alternative action of the trial court in granting a new trial on both the arson and fraud issues.

334 F. 2d 673.

The Scales estate petitioned the Supreme Court for certiorari to review the action of the Court of Appeals in failing to reverse the District Court as to the alternative

motion for a new trial and in failing to reinstate the jury verdict against the building and machinery insurers. The Supreme Court denied certiorari.

380 U. S. 915.
13 L. ed. 2d 801.
85 S. Ct. 895.

The case was remanded to the District Court and tried again before another jury which was unable to agree as to the arson issue, but found Scales to have been guilty of fraud, false swearing, willful concealment and misrepresentation of material facts as to the building and machinery insurers, thus voiding the building and machinery policies and further pursuant to Tennessee Code Annotated, Section 56-1106, rendered a judgment against the Scales estate and in favor of the building and machinery insurers in the amount of $5,000.00 upon a finding that suit had been brought against them in bad faith.

The Scales estate appealed to the Sixth Circuit Court of Appeals and that Court affirmed the judgment of the trial Court.

397 F. 2d 889.

The Scales estate petitioned the Circuit Court of Appeals to rehear, which petition was denied, and the Scales estate has now filed this petition for certiorari in the Supreme Court of the United States.

ARGUMENT

The argument presented by the petitioner in support of the petition for certiorari is very much the same argument that was presented in support of the petition for certiorari following the first trial of this case which was docketed in this Court for the October term 1964 as No.

757. That petition for certiorari was denied. 380 U. S. 915, 13 L. ed. 2d 801, 85 S. Ct. 895.

The principal case relied upon by the petitioner is *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, rehearing denied 321 U. S. 802, 64 S. Ct. 610, 88 L. ed. 1089. This is the same case heavily relied upon by the petitioner in her 1964 petition for certiorari.

The present petition for certiorari is nothing more than a reiteration of the 1964 petition. Indeed, it makes not a single complaint about the second trial in the District Court, nor about the second action of the Court of Appeals. It is merely another attack upon the action of the trial court in the first trial of this cause and upon the action of the Court of Appeals in the first trial of this cause and upon the action of the Supreme Court in its denial of certiorari on the first trial.

The previous denial of certiorari by this Court constitutes the law of the case and is not now subject to further review.

Roberts v. *Cooper*, 61 U. S. 467, 15 L. ed. 969.
Worley v. *Elliott*, 231 F. 2d 526 (Sixth Circuit).
White v. *Murtha*, 377 F. 2d 428 (Fifth Circuit).

As held in *White* v. *Murtha*, 377 F. 2d 428, 431:

> "The 'law of the case' rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that 'there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members', and that it would be impossible for an appellate court 'to perform its du-

ties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal' thereof."

Aside from the application of the law of the case rule, the position taken by the petitioner is simply without support in any case from any jurisdiction. Petitioner construes *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, to constitute a complete destruction of the right of a trial court to grant a new trial because the verdict of a jury is against the overwhelming weight of the evidence. In so construing the case petitioner falls into the same fallacy which she asserted in her 1964 petition for certiorari, that is, failure to distinguish between the law as applicable to a situation where a trial court or appellate court sets aside a jury verdict *and directs a verdict for the opposite party*, and a situation wherein a trial court disapproves the jury verdict, sets it aside and *grants a new trial.*

In *Tennant* v. *Peoria & Pekin Union Rwy. Co.*, 321 U. S. 529, 64 S. Ct. 409, 88 L. ed. 520, plaintiff brought an action under the Federal Employer's Liability Act. The jury returned a verdict for the plaintiff and the *District Court entered judgment accordingly.* On appeal by the defendant the Seventh Circuit Court of Appeals reversed the judgment finding that while there was evidence of negligence by the defendant, there was no substantial proof that this negligence was the proximate cause of Tennant's death. The Court of Appeals further held that the District Court should have *directed a verdict in favor of the respondent or allowed its motion for judgment notwithstanding the verdict.*

The Supreme Court of the United States reversed the Seventh Circuit Court of Appeals holding

> "Upon an examination of the record we cannot say that the inference drawn by this jury that respondent's negligence caused the fatal accident is without support in the evidence. *Thus, to enter a judgment for respondent notwithstanding the verdict* is to deprive petitioner of the right to a jury trial." (Emphasis added)

The opinion of the trial court in *Tennant* v. *Peoria & Pekin Union Rwy. Co.* is unreported.

The opinion of the Court of Appeals of the Seventh Circuit in *Tennant* v. *Peoria & Pekin Union Rwy. Co.* is reported at 134 F. 2d 860. Nowhere in the opinion of the Seventh Circuit Court of Appeals, nor in the opinion of the Supreme Court does it appear that a motion for a new trial was ever filed in the case. The sole complaint of the defendant acted upon by the Seventh Circuit Court of Appeals was the failure of the trial Judge to direct a verdict for the defendant at the close of the plaintiff's evidence. The Court of Appeals for the Seventh Circuit held that the trial court erred in not directing a verdict and remanded the case to the trial court for entry of judgment for the defendant. The Supreme Court of the United States reviewed the action of the Seventh Circuit Court of Appeals and reversed, holding that the trial court was correct in not directing a verdict.

In the case at Bar the Sixth Circuit Court of Appeals followed this very rule in its opinion on the first appeal reported at 334 F. 2d 673. The Court of Appeals there held that the trial court erred in granting judgment notwithstanding the verdict.

Appendix A-16, 17.

The difference in the Tennant case and the case at Bar lies in the fact that these respondents filed a combined motion for judgment notwithstanding the verdict *or in the alternative for a new trial.*

Such a procedure was clearly proper.

> *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, 85 L. ed. 147, 61 S. Ct. 189.

The trial court granted both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial, the alternative motion being sustained upon two grounds, to-wit:

1. The verdict of the jury was against the overwhelming weight of the evidence on the issues of fraud, etc., and arson;

2. The plaintiff's counsel was guilty of prejudicial misconduct.

Appendix A-54, 55.

The Court of Appeals for the Sixth Circuit in reviewing the action of the trial court in sustaining both the motion for judgment notwithstanding the verdict and the alternative motion for a new trial followed *Tennant* v. *Peoria & Pekin Union Rwy. Co.,* 321 U.S. 529, 64 S. Ct. 409, 88 L. ed. 520, and reversed the judgment notwithstanding the verdict. The Court thereupon proceeded to follow the undisputed rule that the action of a trial court in granting or refusing a motion for a new trial is a matter resting in the discretion of the trial Judge and is not reviewable except for an abuse of discretion.

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false,

> or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. *The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.*" (Emphasis added)

Aetna Cas. & Sur. Co. v. *Yeatts*, 122 F. 2d 352.

The distinction which the petitioner in the case at Bar overlooks is clearly stated in *General American Life Ins. Co.* v. *Central Nat. Bank of Cleveland*, 136 F. 2d 823, as follows:

> "* * *, the mental process in deciding a motion to direct a verdict is very different from that used in deciding a motion to set aside a verdict as against the weight of evidence. In the former there is no weighing of plaintiff's evidence with defendant's. It is only an examination into the sufficiency of plaintiff's evidence to support a burden, ignoring defendant's evidence. In the latter, it is always a comparison of opposing proofs."

The case at Bar is directly in line with and governed by the undisputed rule laid down in *Turner* v. *United States*, 229 F. 2d 944. That case originating in the Federal District Court for the Eastern District of Tennessee involved a suit between the wife and the mother of a deceased war veteran to determine who was the beneficiary of certain government insurance. The case was tried before a jury which returned a verdict in favor of the mother. The trial court set aside the verdict and granted a new trial. On appeal the Sixth Circuit Court of Appeals affirmed.

> "The controlling question is whether the order of the District Court granting a new trial constituted a clear abuse of discretion. *Washington Times Com-*

pany v. *Bonner*, 66 App. D. C. 280, 86 F. 2d 836, 848, 110 A.L.R. 393; *Kansas City Stockyards Company of Maine* v. *Anderson*, 3 Cir., 199 F. 2d 91, 95, 36 A.L.R. 2d 1; *Spero-Nelson* v. *Brown*, 6 Cir., 175 F. 2d 86, 89; *United States* v. *Johnson*, 327 U.S. 106, 112-113, 66 S. Ct. 464, 90 L. ed. 562. It was held in the Spero-Nelson case that where the jury's verdict resolves a factual question the trial court's action in overruling such motion cannot be reviewed by the Court of Appeals unless it involves an abuse of discretion. The granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and his action thereon is not reviewable upon appeal save in the most exceptional circumstances. *Aetna Casualty & Surety Co.* v. *Yeatts*, 4 Cir., 122 F. 2d 350-354. We therefore are concerned only as to whether the District Court clearly abused its discretion in granting the new trial. *Cf. Hill* v. *Pennsylvania Greyhound Lines, Inc.*, 3 Cir., 174 F. 2d 171, 172. An appellate court reviewing an order granting a new trial will consider all intendments in favor of the order made by the trial judge. The order will not be reversed if the record discloses any tenable ground in support of the order. *Cicrich* v. *State Industrial Accident Commission*, 143 Or. 627, 635, 636, 23 P. 2d 534. . . .

"As declared by the Fourth Circuit in *Aetna Casualty & Surety Co.* v. *Yeatts*, supra, 122 F. 2d at page 352, Judge Parker writing the opinion:

> 'It is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice. . . .' "

No better authority in refutation of the assertions made by the petitioner can be found than *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879, a case strongly relied upon by the petitioner.

In that case the Supreme Court held:

"These decisions make it plain, first, that the action of the Circuit of Appeals in setting aside the verdict and assuming to pass upon the issues of fact, and to direct a judgment accordingly, must be tested by the rules of the common law; second, that while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess, and cut off the plaintiff's right to have the facts settled by the verdict of a jury."

* * *

"The judgment of the Circuit Court of Appeals is accordingly modified by eliminating the direction to enter judgment for the defendant notwithstanding the verdict, and by substituting a direction for a new trial."

Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879.

CONCLUSION

The petitioner in this cause brought to this Court a petition for certiorari four (4) years ago asserting the very same position which she asserts in the present petition. This Court denied the petition for certiorari.

380 U. S. 915.

13 L. ed. 2d 801.

85 S. Ct. 895.

The petitioner then lost a jury verdict on a pure question of fact.

She appealed again to the Sixth Circuit Court of Appeals and lost.

397 F. 2d 889.

She now petitions this Court, raising not a single question concerning any of the proceedings of the second trial, but rather reverts back to the same complaint which she asserted four (4) years ago.

Respondents respectfully submit that the previous action of this Court in denying certiorari upon these same grounds constitutes the law of the case.

Respondents further submit that the present petition for certiorari presents no question properly the subject of a writ of certiorari.

Respondents aver that the application for a writ of certiorari should be denied.

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